

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAYMOND DALLACQUA :
d/b/a MR. SHELL NO. 6009 :
:
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1980 :
through August 31, 1982. :

In the Matter of the Petition :
of :
RAYMOND DALLACQUA : DETERMINATION
d/b/a MR. SHELL NO. 6010 :
:
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1980 :
through August 31, 1982. :

In the Matter of the Petition :
of :
RAYMOND DALLACQUA :
d/b/a MR. SHELL NO. 6111 :
:
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1980 :
through May 31, 1982. :

Petitioner Raymond Dallacqua d/b/a Mr. Shell No. 6009, 17 Gaigal Drive, Nesconset, New York 11787, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1982 (File No. 801915). Petitioner Raymond Dallacqua d/b/a Mr. Shell No. 6010, 17 Gaigal Drive, Nesconset, New York 11787, filed a petition for revision of a determination or for

refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1982 (File No. 801916).

Petitioner Raymond Dallacqua d/b/a Mr. Shell No. 6111, 17 Gaigal Drive, Nesconset, New York 11787, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1982 (File No. 801914).

A consolidated hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 15, 1987 at 1:30 P.M. with all additional evidence and briefs to be filed by March 1, 1988. Petitioner appeared by Katz and Bernstein (Robert Katz, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether an agreement between petitioner and the Attorney General of the State of New York reached pursuant to a plea bargain finally and irrevocably fixed the tax due from petitioner for the periods at issue.

II. Whether petitioner has established that the Audit Division erred in its calculation of tax due.

FINDINGS OF FACT

1. In January 1982, the Audit Division began a concurrent audit for the period March 1, 1979 through November 30, 1981 of three gasoline service stations operated by petitioner: Raymond Dallacqua d/b/a Mr. Shell No. 6009, Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111.

2. Raymond Dallacqua was a sole proprietor who operated several gasoline service stations, including the three which are the subject of this determination.

3. In response to its request for books and records, the Audit Division received Mr. Dallacqua's Federal income tax returns reflecting receipts and expenses for the three stations for 1979 and 1980, an operating analysis of petitioner's sales and purchases for the audit period, bank statements, cancelled checks and sales tax returns. In addition, an auditor visited the three stations on February 4, 1982. All of the stations were operating and sold gasoline, oil, soda and cigarettes. Mr. Shell No. 6111 performed repairs on automobiles.

4. For each station, the auditor compared sales as reported on Mr. Dallacqua's Federal income tax and State sales tax returns with sales shown in its books. There was total agreement among the three. The auditor then compared Mr. Dallacqua's gasoline purchases, as shown in his own records, with a verification of each service station's gasoline purchases provided to the Audit Division by the Shell Oil Corporation ("Shell"). This comparison disclosed that the number of gallons of gasoline purchased by each station was significantly higher than the number of gallons of gasoline Mr. Dallacqua reported selling at each station.

5. On or about July 20, 1982, the auditor forwarded the results of her audit to the Special Investigations Bureau ("SIB"). Although no assessments were issued at this time, the auditor did calculate sales taxes due from Mr. Dallacqua for each of the three stations for the period March 1, 1979 through May 31, 1980 using the following method:

(a) Monthly average gasoline selling prices were calculated from petitioner's own books and records by dividing gasoline sales by gallons of gasoline purchased.

(b) Petitioner's gasoline purchases, as recorded in its own records were subtracted from actual gasoline purchases provided by Shell to calculate additional monthly gallonage.

(c) Average monthly selling prices were applied to additional monthly gallonage, resulting in additional monthly gasoline sales.

(d) An error rate was computed for each quarter by dividing additional gasoline sales per quarter by gasoline sales as shown on petitioner's books.

(e) The error rate was applied to total reported sales for each quarter (i.e. sales including gasoline, oil, tires, soda, etc.) to obtain audited additional sales. The appropriate tax rate was applied to the result to obtain sales tax due for each quarter.

6. On August 24, 1984, Raymond Dallacqua d/b/a Mr. Shell No. 6009, executed a consent extending the period of limitation for assessment of sales and use taxes for the taxable period June 1, 1980 through November 30, 1981 to March 20, 1985. On August 26, 1984, Mr. Dallacqua executed two consents on behalf of Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111, similarly extending the period of limitation for assessment of sales and use taxes for those stations. Mr. Dallacqua had previously executed a series of consents on behalf of the three stations on August 25, 1983 and February 10, 1984, respectively, which prevented the time for assessing the taxable period June 1, 1980 through November 30, 1980 from expiring.

7. As a result of SIB's investigations, on May 15, 1984, the Grand Jury of Nassau County handed up an indictment charging Raymond Dallacqua with 35 counts of offering a false instrument for filing in violation of Penal Law § 175.35 and 10 counts of violating Tax Law § 1145(b) by willfully filing false sales tax returns. Counts one through nine of the indictment concerned returns filed for Mr. Shell No. 6009. Counts 10 through 22, 36 and 37 concerned returns filed for Mr. Shell No. 6010. Mr. Shell No. 6111 was not included in the indictment.

8. On November 20, 1984, petitioner pleaded guilty to the first count of the indictment in full satisfaction of the entire indictment. The entire charge was as follows:

"On or about June 20, 1979, in the County of Nassau and elsewhere in the State of New York, with intent to defraud the State and any political subdivision thereof, and knowing that a written instrument, namely a New York State and local sales and use tax return, Form ST-100, for Mr. Shell #6009 contained a false statement and false information, to wit, taxable sales and services for the period of March 1, 1979 to May 31, 1979 reported in an amount less than the true amount, did offer and present it and cause it to be offered and presented to a public office and public servant, namely the New York State Department of Taxation & Finance, with the knowledge and belief that it would be filed with, registered in and otherwise become part of the records of such public office and public servant."

9. In response to questions posed to him by an Assistant Attorney General, Mr. Dallacqua also admitted willfully filing false returns on behalf of Mr. Shell No. 6010.

10. At hearing, Mr. Dallacqua admitted willfully and knowingly filing false sales tax returns on behalf of Mr. Shell No. 6009, Mr. Shell No. 6010 and Mr. Shell No. 6111, during the periods under consideration.

11. When its investigation was concluded, SIB returned the audit files to the Audit Division for assessment of sales taxes. For each of the three stations, the auditor estimated sales and sales taxes due, using the methodology described in Finding of Fact "5"; however, some adjustments were necessitated in each case by missing information. Because third-party verification of purchases was not available after May 31, 1981 for Mr. Shell No. 6009 and Mr. Shell No. 6111, and after November 31, 1981 for Mr. Shell No. 6010, an average error rate was calculated from prior periods and was applied to reported sales for the later periods. In addition, the auditor did not have available sales tax returns for Mr. Shell No. 6009 and Mr. Shell No. 6010 for the period June 1, 1982 through August 31, 1982, and he had no return available for Mr. Shell No. 6111 for the period December 1, 1981 through May 31, 1982. Consequently, for these periods the auditor estimated reported sales based on prior returns.

12. On February 8, 1985, the Audit Division issued against Raymond Dallacqua d/b/a Mr. Shell No. 6009 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980 through August 31, 1982, assessing sales tax of \$65,021.02 plus interest and a fraud penalty pursuant to Tax Law § 1145(a)(2). On the same date, it also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Raymond Dallacqua d/b/a Mr. Shell No. 6010 for the period June 1, 1980 through August 31, 1982, assessing taxes of \$110,425.25 plus a fraud penalty and interest. Finally, on February 8, 1985, the Audit Division issued to Raymond Dallacqua d/b/a Mr. Shell No. 6111 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax of \$62,026.10 plus a fraud penalty and interest.

13. As proof of his assertion that Mr. Shell No. 6009 and Mr. Shell No. 6111 stopped doing business as of June 1, 1981, Mr. Dallacqua offered a worksheet prepared by SIB. The worksheet shows Shell purchase verifications only through May 31, 1981; however, that same worksheet shows that Mr. Dallacqua filed sales tax returns for Mr. Shell No. 6009 and Mr. Shell No. 6111 for each sales tax period from December 1, 1979 through May 31, 1982.

14. At hearing, Mr. Dellacqua admitted that he continued to operate Mr. Shell No. 6010 until August 31, 1982, but did not file a return for the period June 1, 1982 through August 31, 1982.

SUMMARY OF PETITIONER'S POSITION

15. Petitioner's representative alleged that prior to Mr. Dallacqua's entering a guilty plea to one count of filing a false instrument an agreement was reached among all concerned parties, including Mr. Dallacqua, SIB, the Assistant Attorney General and the Court, finally and irrevocably fixing the tax due from Mr. Dallacqua at \$220,804.62. This agreement purportedly included Mr. Dallacqua's total liability for Mr. Shell No. 6009, Mr. Shell No. 6010 and Mr. Shell No. 6111, for all periods under consideration. The representative also asserted that Mr. Shell No. 6111 was specifically omitted from the criminal indictment after a finding that its gasoline storage tank leaked so badly that the correct amount of sales tax due from Mr. Shell No. 6111 could not be determined.

16. In the alternative, petitioner's representative argued that the Audit Division's calculation of tax due was erroneous in that it included taxable periods during which the respective service stations were no longer doing business.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rent or charges, comparable rents or charges, type of

accommodations and service, number of employees or other factors."

B. Where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (*Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858). The records of Raymond Dallacqua were admittedly incorrect; therefore, it was proper for the Audit Division to estimate tax pursuant to Tax Law § 1138(a)(1). Petitioner has failed to sustain his burden of proof to show that the audit was incorrect in any respect.

Mr. Dallacqua's testimony regarding his plea bargain agreement was not supported by any other evidence. In this regard, it was especially damaging to Mr. Dallacqua that he was unable to produce a transcript of proceedings before the Court, a memorandum of understanding or any other document to support his contention that all taxes, penalties and interest were fixed as a result of the criminal proceeding. The SIB worksheets bore no relationship to the amount of \$220,804.62 asserted to be the limit of Mr. Dallacqua's tax liability.

Similarly, petitioner has failed to prove that Mr. Shell No. 6009 and Mr. Shell No. 6111 went out of business after May 31, 1981. The SIB worksheets merely show that Shell purchase verifications were not available after that date. Ample evidence was introduced to show that Mr. Shell No. 6009 and Mr. Shell No. 6111 continued to operate after that date: sales tax returns were filed through May 31, 1982; the stations were operating when an auditor visited them in February 1982; and Shell purchase verifications were obtained through February 1982 and made a part of the audit report. (Apparently, purchase verifications beyond May 31, 1981 were not available to the auditor at the time the assessments were issued but were obtained at a later time.) Petitioner presented no evidence that Mr. Shell No. 6111 operated with a leaking gasoline tank. Evidence that Mr. Shell No. 6111 was not included in the indictment is not evidence of the prosecutor's reason for not including it. Finally, Mr. Dallacqua testified that Mr. Shell No. 6010 was operated until August 31, 1982.

Petitioners raised no other issues regarding the audit methodology or results.

C. The burden of proof with respect to the fraud penalty provided under Tax Law § 1145(a)(2) is upon the Audit Division. The Audit Division is required to show by clear and convincing evidence every element of fraud including willful, knowledgeable and intentional acts or omissions constituting false representations by the taxpayer and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982). Through the testimony of Raymond Dallacqua and admissions made by Mr. Dallacqua when he entered a plea of guilty to filing a false instrument, the Audit Division sustained its burden of proof.

D. The petitions of Raymond Dallacqua d/b/a Mr. Shell No. 6009, Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111 are denied, and the notices of determination and demands for payment of sales and use taxes due issued on February 8, 1985 are sustained.

DATED: Albany, New York
April 14, 1988

ADMINISTRATIVE LAW JUDGE